



WILLIAM J. SCOTT

ATTORNEY GENERAL
STATE OF ILLINOIS
500 SOUTH SECOND STREET
SPRINGFIELD

March 8, 1972

FILE NO. NP-407

COUNTIES:
Compatibility

Honorable Thomas P. Carmody
State's Attorney
Macoupin County
Carlinville, Illinois 62626

Dear Mr. Carmody:

I have your recent letter wherein you state:

"Your opinion is requested on the following question which has been asked of the undersigned:

'Can a Township Highway Commissioner run for and serve in the office of County Board Member; that is, are the offices of Township Highway Commissioner and County Board Member compatible?'

Nominations for County Board Members will be made by caucus in this County to be held on February 1, 1972. I need to know the answer to the above question prior to February 1, 1972, in order that I may advise the inquiring parties as to the Attorney General's opinion. Your early response to the above question would therefore be greatly appreciated.

Thanking you and awaiting your reply, I am"

NP 407

From the general rules laid down in People v. Haas, 145 Ill. App. 283, it appears that incompatibility between offices arises where the constitution or a statute specifically prohibits the occupant of either one of the offices from holding the other, or where, because of the duties of either office a conflict in interest may arise, or where the duties of either office are such that the holder of one cannot, in every instance, properly and faithfully perform all the duties of the other.

The general duties of a township highway commissioner are set forth in Sections 6-201.1 to 6-201.17 of "An Act to revise and codify the laws relating to public highways ****", (Ill. Rev. Stat., 1971, Ch. 121, pars. 6-201.1 to 6-201.17.) Your attention is called to the provisions of Section 6-201.10 which states:

"Have authority to make agreements with the highway commissioner of any other road district or with the corporate authorities of any municipality located in the same county or in an adjoining county or with the county board of the county in which such road district is located or of any adjoining county, for the lease or exchange of idle machinery, equipment or tools belonging to the district, upon such terms and conditions as may be mutually agreed upon."

It is apparent that a conflict in interest could easily arise because the township highway commissioner may desire to

contract with the county board. He would, in a sense, be making a contract with himself if he were also a member of the county board.

Your attention is also called to Section 5-101.4 of "An Act to revise and codify the laws relating to public highways ****", Ill. Rev. Stat., 1971, Ch. 121, par. 5-101.4 which states one of the powers of the county board to be:

"To appropriate funds to aid in the construction of township and district highways in any part of the county."

If a township highway commissioner were also a member of the county board he might tend to favor his township highways in the appropriation of funds.

Also, it should be noted that Section 5-502 of the aforesaid Act permits the county board to enter into certain joint construction and repair contracts with other highway authorities.

An examination of various provisions of "An Act to revise and codify the laws relating to public highways ****" indicates that in certain instances that the actions of the highway commissioner are under the supervision of the county superintendent of highways who in turn is subordinate to the

county board. An example of this is found in Section 6-401 of the aforesaid Act which states:

"****

If the county superintendent of highways determines as a result of such hearing that the road described in the petition is in need of repair, or is not properly maintained by the highway commissioner of the district, he shall order the highway commissioner of the district to make such repairs as appear to him to be proper or necessary, or to properly maintain such road or section of road.

****"

In conclusion, I am of the opinion that the office of township highway commissioner is incompatible with that of member of the county board because a conflict of interest may arise from the duties of these offices.

Very truly yours,

A T T O R N E Y G E N E R A L



OFFICE OF THE ATTORNEY GENERAL

STATE OF ILLINOIS

May 23, 2001

Jim Ryan

ATTORNEY GENERAL

I - 01-025

COMPATIBILITY OF OFFICES:

Fire Protection District Trustee and
Fire Chief of Fire Protection District;
Drainage District Commissioner and
Township Highway Commissioner

The Honorable John C. Piland
State's Attorney, Champaign County
101 East Main Street
Post Office Box 785
Urbana, Illinois 61803-0785

Dear Mr. Piland:

I have Assistant State's Attorney Joel D. Fletcher's letter wherein he inquired, on your behalf, whether the following positions are incompatible: fire protection district trustee and fire chief of the fire protection district; and drainage district commissioner and road district commissioner. Because of the nature of this inquiry, I will comment informally upon the questions that have been raised.

The common law doctrine of incompatibility of offices precludes simultaneous tenure in two public offices where the constitution or a statute specifically prohibits the occupant of either office from holding the other, or where the duties of the two offices conflict so that the holder of one cannot, in every instance, properly and faithfully perform all of the duties of the other. (People ex rel. Fitzsimmons v. Swailes (1984), 101 Ill. 2d 458, 465; People ex rel. Myers v. Haas (1908), 145 Ill. App. 283, 286.) The doctrine of incompatibility generally extends only to public offices, and not to employment relationships (1975 Ill. Att'y Gen. Op. 278). Indicia of public office include the creation of the position by law, the requirement of an oath or a bond, duties prescribed by law rather than by

contract or agreement and the continuous nature of the duties of the position without regard to the particular person who holds the position. Wargo v. Industrial Comm'n (1974), 58 Ill. 2d 234, 237; People v. Brady (1922), 302 Ill. 576, 582.

With respect to the first part of this inquiry, it is clear that a fire protection district trustee holds a public office. The determination of whether the fire chief of a fire protection district is a public officer, however, requires an examination of the statutory provisions relating to that position. Section 6 of the Fire Protection District Act (70 ILCS 705/6 (West 1998)) provides, in pertinent part:

"The trustees shall constitute a board of trustees for the district for which they are appointed, which board of trustees is declared to be the corporate authority of the fire protection district, and shall exercise all of the powers and control all the affairs and property of such district. The board of trustees at their initial meeting and at their first meeting following the commencement of the term of any trustee shall elect one of their number as president and one of their number as secretary and shall elect a treasurer for the district, who may be one of the trustees or may be any other citizen of the district and who shall hold office during the pleasure of the board and who shall give such bond as may be required by the board. Except as otherwise provided in Sections 16.01 through 16.18, the board may appoint a fire chief and such firemen as may be necessary for the district who shall hold office during the pleasure of the board and who shall give such bond as the board may require. The board may prescribe the duties and fix the compensation of all the officers and employees of the fire protection district. * * *" (Emphasis added.)

Section 16.04a of that Act (70 ILCS 705/16.04a (West 1998)) additionally provides, in relevant part:

"The board of fire commissioners shall appoint all officers and members of the fire departments of the district, except the Chief of the fire department. The Chief of the fire department shall be appointed by the trustees.

* * *

"

(Emphasis added.)

Sections 6 and 16.04a of the Fire Protection District Act authorize the board of trustees of the fire protection district to appoint a fire chief. Section 6 provides that the fire chief shall "hold office" during the pleasure of the board and shall give such bond as the board may require. The board of trustees is authorized to prescribe the duties and fix the compensation of all of the officers and employees of the fire protection district. (70 ILCS 705/6 (West 1998).) In addition to the duties which may be established by the board of trustees, section 16.13b of the Act (70 ILCS 705/16.13b (West 1998)) provides that the chief of the fire department has the burden of proving the guilt of an officer or member of the department at a hearing on removal or discharge, and that the chief also has the authority to suspend members of his department without pay for a period of up to five consecutive calendar days. (70 ILCS 705/16.13b (West 1998).) Pursuant to section 6 of the Fire Investigation Act, the fire chief is required to investigate the cause, origin and circumstances of every fire within the fire protection district or upon any area or property which is furnished fire protection by the fire protection district.

Several factors support the conclusion that a fire chief is a public officer. Significantly, a fire chief is required to give a bond in the amount required by the board of trustees and "hold[s] office" at the pleasure of the board. The position of fire chief is created by statute and is a continuous position. Although the majority of a fire chief's duties are not fixed by statute, but by the trustees of the fire protection district, it appears, on balance, that a fire chief is an officer of the Fire Protection District, and that the doctrine of incompatibility would therefore be applicable to the offices of trustee and fire chief. There is no constitutional or statutory provision which prohibits one person from simultaneously serving in these two capacities. The issue, therefore, is whether the duties of either office are such that the holder of one cannot,

The Honorable John C. Piland - 4.

in every instance, fully and faithfully discharge the duties of the other.

Incompatibility of offices on this basis may arise because one of the offices is subordinate to the other. (See People ex rel. Fitzsimmons v. Swailes (1984), 101 Ill. 2d 458; Rogers v. Tinley Park (1983), 116 Ill. App. 3d 437; People ex rel. Teros v. Verbeck (1987), 155 Ill. App. 3d 81.) In these circumstances, the office of fire chief of a fire protection district is clearly subordinate to the office of fire protection district trustee. The board of trustees of a fire protection district appoints the fire chief, prescribes the fire chief's duties and fixes the compensation of the fire chief. (70 ILCS 705/6, 16.04a (West 1998).) It appears, therefore, that the offices of trustee of a fire protection district and fire chief of a fire protection district are incompatible, and, therefore, one person may not simultaneously hold both offices.

I would further note that even if the fire chief were determined to be merely an employee of the fire protection district, simultaneous tenure as a member of the fire protection district board of trustees might well violate applicable statutory prohibitions against the possession of financial interests in district contracts. Section 3 of the Public Officer Prohibited Activities Act (50 ILCS 105/3 (West 1998)) provides, in pertinent part:

" * * *

(a) No person holding any office, either by election or appointment under the laws or Constitution of this State, may be in any manner financially interested directly in his own name or indirectly in the name of any other person, association, trust, or corporation, in any contract or the performance of any work in the making or letting of which such officer may be called upon to act or vote. * * * Any contract made and procured in violation hereof is void. * * *

* * *

(Emphasis added.)

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Section 4 of the Fire Protection District Act (70 ILCS 705/4 (West 1998)) further provides, in relevant part:

"

* * *

* * * No trustee or employee of such district shall be directly or indirectly interested financially in any contract work or business or the sale of any article, the expense, price or consideration of which is paid by the district; nor in the purchase of any real estate or other property, belonging to the district, or which shall be sold for taxes or assessments or by virtue of legal process at the suit of the district. Nothing in this Section prohibits the appointment or selection of any person or trustee or employee whose only interest in the district is as an owner of real estate in such fire protection district or of contributing to the payment of taxes levied by the district.

* * *

* * *

"

(Emphasis added.)

Section 3 of the Public Officer Prohibited Activities Act and section 4 of the Fire Protection District Act do not, per se, prohibit one person from serving a local government in two capacities. Those provisions, however, would be violated if a fire protection district trustee possessed a personal pecuniary interest in an employment contract entered into with the fire protection district board that was not exempted by compliance with the de minimis interest exceptions contained therein. (See 50 ILCS 105/3(b)(2); 70 ILCS 705/4(C).) Whether a violation would occur, therefore, would necessarily depend upon the amount of the fire chief's compensation. If the fire chief's compensation exceeded the amounts permitted pursuant to statute, he or she would necessarily be precluded from serving as a fire protection district trustee simultaneously.

With regard to the offices of township highway commissioner and drainage district commissioner, there is no constitutional or statutory provision which prohibits one person from simultaneously serving in both offices. The issue, therefore, is

whether the duties of either office are such that the holder of one cannot, in every instance, fully and faithfully discharge the duties of the other.

Pursuant to section 73-5 of the Township Code (60 ILCS 1/73-5 (West 1998)), the highway commissioner of each road district comprised of a single township exercises the powers and duties provided for in article 6 of the Illinois Highway Code. (605 ILCS 5/6-101 et seq. (West 1998).) Pursuant thereto, the duties of the township highway commissioner include: having general charge of roads in his district (605 ILCS 5/6-201.8 (West 1998)); constructing, maintaining, and repairing roads within the district and letting contracts, employing labor and purchasing material and machinery therefor (605 ILCS 5/6-201.7 (West 1998)); determining the taxes necessary to be levied on property within his district for road purposes (605 ILCS 5/6-201.5 (West 1998)); placing, erecting and maintaining traffic-control devices and signs on township and road district roads, subject to the approval of the county superintendent of highways (605 ILCS 5/6-201.16 (West 1998)); making agreements with the highway commissioner of other road districts or with the corporate authorities of any municipality in the same or an adjoining county or with the county board of the same or an adjoining county for the lease or exchange of idle machinery, equipment or tools belonging to the district (605 ILCS 5/6-201.10 (West 1998)); and contracting with the highway commissioner of any other road district or with the corporate authorities of any municipality or county to furnish or obtain services and materials related to construction, maintenance or repair of roads. (605 ILCS 5/6-201.10-1 (West 1998).)

The duties of a drainage district commissioner are set out in the provisions of the Illinois Drainage Code. (70 ILCS 605/1-1 et seq. (West 1998).) Section 4-14 of the Code (70 ILCS 605/4-14 (West 1998)) provides, inter alia, that commissioners are empowered to:

"* * * (e) use any part of any public highway for the purposes of work to be done, provided such use will not permanently destroy or materially impair such public highway for public use; * * *"

In opinion No. 1854, issued March 19, 1929 (1929 Ill. Att'y Gen. Op. 123), Attorney General Carlstrom concluded that

the offices of drainage district commissioner and highway commissioner were incompatible based upon a statute which contained the language currently codified in subsection 4-14(e) of the Code. (See Ill. Rev. Stat. 1927, ch. 42, par. 123.) The statute in effect when opinion No. 1845 was issued, however, also contained additional language which authorized a drainage district commissioner to assess the public road to pay a portion of the benefits received if the public highway would be benefitted by the work performed by the drainage district commissioner. (See Ill. Rev. Stat. 1927, ch. 42, par. 123; 1929 Ill. Att'y Gen. Op. 123.) It appears that drainage district commissioners no longer have the authority to assess public highways, however. (See Public Act 83-726, effective September 23, 1983; 70 ILCS 605/4-14, 5-2, 5-3 (West 1998); In re East Lake Fork Special Drainage District v. Village of Ivesdale (1985), 137 Ill. App. 3d 473.) The authority of a drainage district commissioner to use any public highway for purposes of work to be done, standing alone, does not appear to create a conflict of duties with the office of highway commissioner. It appears, therefore, that the reasoning of opinion No. 1854 is no longer persuasive.

Section 6-4 of the Drainage Code (70 ILCS 605/6-4 (West 1998)), however, provides as follows:

"Contracts with Highway Authorities or Railroads for Construction, Maintenance and Use of Levees. The commissioners may contract with highway authorities or with any person, firm or corporation operating a railroad, to construct or maintain a levee or levees, or any portion thereof, upon such terms as may be for the best interests of the district, and may grant to such highway authorities or such person, firm or corporation operating a railroad the right to construct, operate and maintain a highway or railroad upon, along or across such levee or levees. The commissioners may also contract with highway authorities or with any person, firm or corporation operating a railroad to use any embankment, or any part thereof, constructed by such highway authority or by such person, firm or corporation as a district levee or as a part of the levee system of the district. Any such contract shall be subject

to approval by the court, after hearing,
either without notice or upon such notice as
the court may direct."

Pursuant to section 6-4 of the Code, drainage district commissioners may enter into contracts with highway authorities to construct or maintain levees, and may grant highway authorities the right to construct, operate or maintain a highway upon, along or across levees. The commissioners may also contract with highway authorities to use any embankment constructed by the highway authority as a district levee or as part of the levee system of the district. A township highway commissioner is the highway authority for a township or district road in a county unit road district. (605 ILCS 5/2-213 (West 1998).)

A drainage district commissioner, in exercising the powers granted to that office under the Illinois Drainage Code (70 ILCS 605/4-1 et seq. (West 1998)), has a duty to protect and represent the best interests of the drainage district. A township highway commissioner has a concomitant duty to represent and protect the interests of the road district. It has long been established that one person cannot adequately represent the interests of two governmental units when those units contract with one another. (1991 Ill. Att'y Gen. Op. 188; 1976 Ill. Att'y Gen. Op. 116; 1975 Ill. Att'y Gen. Op. 37.) Because of the potential conflict in duties which are present, a person who served simultaneously as a drainage district commissioner and as a township highway commissioner would not be able to represent the interests of both entities adequately, fully and faithfully. It appears, therefore, that the offices of drainage district commissioner and township highway commissioner are incompatible and that one person cannot simultaneously hold both offices.

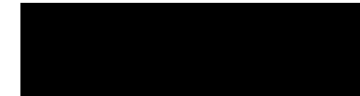
It has apparently been suggested that such incompatibility of offices may be avoided by having a drainage district commissioner recuse himself from acting or participating in matters in which a conflict of duties might arise. Illinois courts, however, have concluded that recusal does not avoid the application of the doctrine of incompatibility of offices. (People ex rel. Teros v. Verbeck (1987), 155 Ill. App. 3d 81, 84; Rogers v. Village of Tinley Park (1983), 116 Ill. App. 3d 437, 445-47.) Consequently, an agreement by a drainage district commissioner to recuse himself or herself from acting in any matter which might conflict with his or her duties as a township

The Honorable John C. Piland - 9.

highway commissioner would be ineffective to cure the underlying incompatibility.

This is not an official opinion of the Attorney General. If we may be of further assistance, please advise.

Sincerely,



MICHAEL J. LUKE
Senior Assistant Attorney General
Chief, Opinions Bureau

MJL:LAS:cj



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Jim Ryan
ATTORNEY GENERAL

September 27, 2000

I - 00-039

COMPATIBILITY OF OFFICES:
Fire Protection District Trustee
and Township Highway Commissioner

The Honorable William G. Workman
State's Attorney, Logan County
Logan County Courthouse - Room 31
Lincoln, Illinois 62656

Dear Mr. Workman:

I have your letter wherein you inquire whether one person may simultaneously serve in the offices of fire protection district trustee and township highway commissioner. Because of the nature of your inquiry, I do not believe that the issuance of an official opinion is necessary. I will, however, comment informally upon the question you have raised.

The common law doctrine of incompatibility of offices precludes simultaneous tenure in two public offices where the constitution or a statute specifically prohibits the occupant of either office from holding the other, or where the duties of the two offices conflict so that the holder of one cannot, in every instance, properly and faithfully perform all of the duties of the other. (People ex rel. Fitzsimmons v. Swailes (1984), 101 Ill. 2d 458, 465; People ex rel. Myers v. Haas (1908), 145 Ill. App. 283, 286.) There is no constitutional or statutory provision which prohibits one person from simultaneously serving as both a fire protection district trustee and a township highway

commissioner. The issue, therefore, is whether the duties of either office are such that the holder of one cannot, in every instance, fully and faithfully discharge the duties of the other.

The operations of fire protection districts are governed by the provisions of the Fire Protection District Act (70 ILCS 705/0.01 et seq. (West 1998)). The powers of a fire protection district are exercised by its board of trustees. (70 ILCS 705/6 (West 1998).) The duties of a fire protection district board include, inter alia: acquiring and holding lands for the use of the fire protection district (70 ILCS 705/10 (West 1998)); contracting with other fire protection districts or municipalities for the joint ownership of fire fighting equipment, communication equipment, rescue and resuscitator equipment and real and personal property necessary for the care and housing of such equipment (70 ILCS 705/10b (West 1998)); contracting with corporations organized to furnish fire protection services (70 ILCS 705/11a (West 1998)); implementing and maintaining an address system (70 ILCS 705/11e (West 1998)); borrowing money for corporate purposes and issuing bonds therefor (70 ILCS 705/12 (West 1998)); levying taxes for the operation of the district (70 ILCS 705/14 (West 1998)); and generally providing fire protection services for the persons and property located within the district. (70 ILCS 705/1 (West 1998).)

Pursuant to section 73-5 of the Township Code (60 ILCS 1/73-5 (West 1998)), the highway commissioner of each road district comprised of a single township exercises the powers and duties provided for in Article 6 of the Illinois Highway Code. (605 ILCS 5/6-101 et seq. (West 1998).) Pursuant thereto, the duties of the township highway commissioner include: having general charge of the roads of his district (605 ILCS 5/6-201.8 (West 1998)); constructing, maintaining and repairing roads within the district and letting contracts, employing labor and purchasing material and machinery therefor (605 ILCS 5/6-201.7 (West 1998)); determining the taxes necessary to be levied on property within his district for road purposes (605 ILCS 5/6-201.5 (West 1998)); erecting and maintaining guide and direction signs at intersections of public roads (605 ILCS 5/6-201.11 (West 1998)); placing, erecting and maintaining traffic-control devices and signs on township and road district roads, subject to the approval of the County Superintendent of Highways (605 ILCS 5/6-

201.16 (West 1998)); making agreements with the highway commissioner of other road districts or with the corporate authorities of any municipality in the same or an adjoining county or with the county board of the same or an adjoining county for the lease or exchange of idle machinery, equipment or tools belonging to the district (605 ILCS 5/6-201.10 (West 1998)); and contracting with the highway commissioner of any other road district or with the corporate authorities of any municipality or county to furnish or obtain services and materials related to construction, maintenance or repair of roads. (605 ILCS 5/6-201.10-1 (West 1998).)

Based upon a review of the duties of these offices, it does not appear that any potential conflict of duties would prevent one person from faithfully discharging the duties of both offices simultaneously. The duties of a fire protection district trustee and of a township highway commissioner are significantly different. Further, there is no express authorization for one entity to contract with the other, nor any obvious circumstance in which there would be interaction between a fire protection district trustee and a township highway commissioner. It appears, therefore, that one person may simultaneously serve as a fire protection district trustee and a township highway commissioner.

In your letter, you state that concern has been expressed that the duties of the offices might conflict because both the fire protection district board of trustees and the township highway commissioner are required to determine the necessary taxes to be levied within their respective boundaries, and non-home-rule taxing districts within Logan County have been made subject to the Property Tax Extension Limitation Law (35 ILCS 200/18-185 et seq. (West 1998)). The mere fact that both the fire protection district board of trustees and the township highway commissioner are required to determine the necessary taxes to be levied within their respective districts within the limitations established pursuant to the Property Tax Extension Limitation Law does not appear to create a conflict of duties which would prevent one person from serving in both offices. A determination on the part of one entity to raise or lower a levy would, at most, have but an indirect effect upon the levy of the other.

The Honorable William G. Workman - 4.

This is not an official opinion of the Attorney General. If we may be of further assistance, please advise.

Sincerely,



MICHAEL J. LUKE
Senior Assistant Attorney General
Chief, Opinions Bureau

MJL:LAS:ab



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

March 12, 2009

I - 09-002

COMPATIBILITY OF OFFICES:
School Board Member and
Township Highway Commissioner

The Honorable Gary L. Spencer
State's Attorney, Whiteside County
Whiteside County Courthouse
200 East Knox Street
Morrison, Illinois 61270

Dear Mr. Spencer:

I have your letter inquiring whether the offices of school board member and township highway commissioner¹ are compatible. For the reasons discussed below, the offices of school board member and township highway commissioner are incompatible. Consequently, one person may not hold both offices simultaneously.

ANALYSIS

The common law doctrine of incompatibility of offices precludes simultaneous tenure in two public offices if the constitution or a statute specifically prohibits the occupant of either office from holding the other, or if the duties of the two offices conflict so that the holder of one cannot, in every instance, fully and faithfully discharge all of the duties of the other office. *People ex rel. Fitzsimmons v. Swailes*, 101 Ill. 2d 458, 465 (1984); *People ex rel. Smith v. Brown*, 356 Ill. App. 3d 1096, 1098 (2005); *People ex rel. Myers v. Haas*, 145 Ill. App. 283, 286

¹Under the Township Code (60 ILCS 1/1-1 *et seq.* (West 2006)) and the Illinois Highway Code (605 ILCS 5/1-101 *et seq.* (West 2006)), the statutory title for the office of township road commissioner is township highway commissioner (see 60 ILCS 1/73-5 (West 2006); 605 ILCS 5/6-112 (West 2006)). To avoid confusion, we will refer to the office as township highway commissioner in accordance with State statute.

(1908). There is no constitutional or statutory provision that expressly prohibits one person from simultaneously serving as a school board member and township highway commissioner. The issue, therefore, is whether the duties of either office are such that the holder of one cannot, in every instance, fully and faithfully discharge all of the duties of the other.

Powers and Duties of School Board Member

The principal duties of school board members are set forth in article 10 of the School Code (105 ILCS 5/10-1 *et seq.* (West 2006)). The school board exercises the corporate powers of the school district. 105 ILCS 5/10-20.1 through 10-23.12 (West 2006). Their powers relate exclusively to the administration of schools within a particular district and include supervising the education of children, raising revenue by tax levy, hiring teachers, and maintaining schools. *See* 105 ILCS 5/10-20.1 through 10-23.12 (West 2006); *see also* Ill. Att'y Gen. Inf. Op. No. I-94-030, issued June 8, 1994; Ill. Att'y Gen. Inf. Op. No. I-89-066, issued December 5, 1989.

In connection with the construction of schools, school boards are authorized to lay out and provide for the construction of access roads necessary to connect school grounds, on which a new school is being or is about to be constructed, to an improved road or highway. Such roads are to be considered part of the general school construction project and financed solely from funds derived from the sale of bonds. 105 ILCS 5/10-22.36A (West 2006). School boards are also authorized "[t]o acquire, install, operate and maintain traffic signals relative to school crossing protection and school crossing stop signals" with the prior approval of "any public body or official having jurisdiction over any street or highway affected[.]" 105 ILCS 5/10-22.28a (West 2006). Further, under section 5-29 of the School Code (105 ILCS 5/5-29 (West 2006)), whenever township or road district authorities lay out a new road, street, or highway, or alter, widen, or relocate existing roads, streets, or highways, and require property used or owned for school purposes, "the trustees of schools or school officials having legal title to such lands have the power, with the consent of the school board of the district, to sell and convey to the * * * township or road district the land required for such purposes[.]"

Powers and Duties of Township Highway Commissioner

Under article 6 of the Illinois Highway Code (605 ILCS 5/6-101 *et seq.* (West 2006)), in counties under township organization, each township is considered to be a road district for all purposes relating to the construction, repair, maintenance, financing, and supervision of township roads, unless the township has been consolidated into a consolidated road district. 605 ILCS 5/6-102 (West 2006). The township highway commissioner has general charge of the roads in the district (605 ILCS 5/6-201.8 (West 2006)) and is authorized to direct the expenditure of all moneys collected in the district for road purposes (605 ILCS 5/6-201.6 (West 2006)),

including, among other things, laying out, altering, widening, or vacating township roads (605 ILCS 5/6-201.2 (West 2006)), constructing, maintaining, and repairing roads within the district, and letting contracts, employing labor, and purchasing materials and machinery therefor (605 ILCS 5/6-201.7 (West 2006)). Under the Illinois Highway Code (605 ILCS 5/1-101 *et seq.* (West 2006)), township and district road systems include "all rural roads to which this Code applies under Section 1-103 and which are not a part of the State highway system, county highway system or municipal street system, and includes any access road constructed under Section 10-22.36A of The School Code which connects school grounds with such a rural road." 605 ILCS 5/2-103 (West 2006).

Conflict of Duties

Based on the foregoing statutory provisions, it is clear that potential conflicts in the duties of the offices of school board member and township highway commissioner could prevent one person from faithfully discharging the duties of each office simultaneously.

One potential area of conflict relates to the use of tax moneys for township highway or road purposes. As previously noted, a township road district is responsible for the maintenance and repair of all roads in the district, including access roads constructed by school districts. A person simultaneously holding the offices of school board member and township highway commissioner may not fairly represent the interests of each governmental entity in deciding the appropriate use of tax dollars for highway maintenance and repair purposes relative to school access roads. *See generally* Ill. Att'y Gen. Inf. Op. No. I-05-002, issued January 31, 2005 (finding the office of village trustee and township highway commissioner to be incompatible). Further, if a school district wishes to install and operate school crossing signals along a township highway or road, then the township highway commissioner's prior approval is required. Again, a person holding both offices could be placed in the position of favoring one governmental entity over the other.

In addition, the township highway commissioner is authorized to purchase school property necessary for the construction or alteration of township highways or roads. Prior to any such sale, the school board for the affected district must provide its consent to the sale. If an individual were to serve as both a school board member and a township highway commissioner, and those governmental entities were to contract for the sale of school property, the officer would be required to protect the interests of both the school district and the township road district. It has long been established, however, that one person cannot adequately represent the interests of two governmental units when those units contract with one another. 1991 Ill. Att'y Gen. Op. 188, 189; 1975 Ill. Att'y Gen. Op. 37, 43-47; Ill. Att'y Gen. Inf. Op. No. I-01-025, issued May 23, 2001. A school board member, in exercising the duties granted to that office under the School Code, is to faithfully discharge his or her duties, which include protecting the school district's

assets and representing the best interests of the school district. 105 ILCS 5/10-16.5 (West 2006). A township highway commissioner has a concomitant duty to faithfully discharge his or her duties by protecting and representing the best interests of the township road district. 605 ILCS 5/6-118 (West 2006); Ill. Const. 1970, art. XIII, §3. The fulfillment of these duties is subject to compromise, if the same individual holds both the office of school board member and township highway commissioner, because a person holding both offices could be placed in the position of favoring one governmental entity to the detriment of the other. It is a logical extension of this principle that one person cannot fully and faithfully represent the interests of two governmental entities when those entities must approve or consent to a contract related to the sale of public property.

CONCLUSION

Because of the potential conflicts in the duties of the offices of school board member and township highway commissioner, a person who serves in both offices simultaneously would not be able, in every instance, to represent the interests of both entities adequately, fully, and faithfully. Therefore, the offices of school board member and township highway commissioner are incompatible, and one person may not hold both positions simultaneously.

This is not an official opinion of the Attorney General. If we may be of further assistance, please advise.

~~Very truly yours,~~

LYNN E. PATTON
Senior Assistant Attorney General
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OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

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January 31, 2005

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COMPATIBILITY OF OFFICES:
Village Trustee and Township
Highway Commissioner

The Honorable Julia Rietz
State's Attorney, Champaign County
101 East Main Street
P.O. Box 785
Urbana, Illinois 61801

Dear Ms. Rietz:

I have your predecessor's letter wherein he inquired whether one person may simultaneously hold the offices of township highway commissioner and village trustee, where the village is located entirely within the township. Because of the nature of the inquiry, I do not believe that the issuance of an official opinion is necessary. I will, however, comment informally upon the question that has been raised.

The common law doctrine of incompatibility of offices precludes simultaneous tenure in two public offices where the constitution or a statute specifically prohibits the occupant of either office from holding the other, or where the duties of the two offices conflict so that the holder of one cannot, in every instance, properly and faithfully perform all of the duties of the other office. *People ex rel. Fitzsimmons v. Swailes*, 101 Ill. 2d 458, 465 (1984); *People v. Claar*, 293 Ill. App. 3d 211, 217 (1997), *appeal denied*, 177 Ill. 2d 574 (1998); *People ex rel. Myers v. Haas*, 145 Ill. App. 283, 286 (1908). There is no constitutional or statutory provision which prohibits one person from serving simultaneously as both a township highway commissioner and a village trustee. The issue, therefore, is whether the duties of either office are such that the holder of one cannot, in every instance, fully and faithfully discharge the duties of the other.

Pursuant to section 73-5 of the Township Code (60 ILCS 1/73-5 (West 2002)), the township highway commissioner in a road district comprised of a single township exercises the powers and duties provided in article 6 of the Illinois Highway Code. 605 ILCS 5/6-101 *et seq.* (West 2002); 605 ILCS 5/6-201 (West 2002). A review of the provisions of article 6 of the Highway Code indicates that it is among the township highway commissioner's duties: (1) to have general charge of the roads of the district (605 ILCS 5/6-201.8 (West 2002)); (2) to construct, maintain and repair roads within the district and let contracts, employ labor and purchase materials and machinery therefor (605 ILCS 5/6-201.7 (West 2003 Supp.)); and (3) to lay out, alter, widen or vacate township roads (605 ILCS 5/6-201.2 (West 2002)).

The township highway commissioner is also authorized, pursuant to the provisions of the Illinois Highway Code, to enter into various types of cooperative relationships with municipal authorities. Specifically, the township highway commissioner may: (1) enter into agreements with the corporate authorities of any municipality for the lease or exchange of idle machinery, equipment or tools belonging to the district, upon such terms and conditions as may be mutually agreed upon (605 ILCS 5/6-201.10 (West 2002)); (2) contract with the corporate authorities of any municipality to furnish or obtain services and materials related to the construction, maintenance or repair of roads (605 ILCS 5/6-201.10-1 (West 2002)); and (3) with the consent of the Illinois Department of Transportation, turn over to any municipality lying wholly within the road district, moneys from the regular road taxes to be used by the municipality for the construction of State and county highways and municipal streets within its corporate limits (605 ILCS 5/6-511 (West 2002)).

Similarly, the village board of trustees serves as the corporate authorities of the village (65 ILCS 5/1-1-2(2) (West 2002)), and is authorized to adopt ordinances that carry into effect the statutory powers granted to villages. 65 ILCS 5/1-2-1, 3.1-45-5 (West 2002). The village board has been granted the general statutory authority to construct, maintain and improve streets and roads within the municipality. 605 ILCS 5/7-101 (West 2002). Moreover, the village board may acquire property by eminent domain, including property outside of, but adjacent and contiguous to, the corporate limits of a municipality where required for street and highway purposes (65 ILCS 5/11-61-1 (West 2002)).

In addition, pursuant to section 6-507 of the Illinois Highway Code (605 ILCS 5/6-507 (West 2002)), the village board may expend certain funds received from a township road district's tax levy to improve roads and streets within or outside the village. Any moneys expended by a village to improve township roads, however, must be expended with the consent of the township highway commissioner. If the village has not appropriated the moneys transferred by the township road district within one year after receipt thereof, then the unappropriated funds are to be returned to the treasurer of the township road district and used for road purposes within that district.

Based upon the foregoing, it is clear that potential conflicts in the duties of these offices could prevent one person from faithfully discharging the duties of each simultaneously. A township highway commissioner, in exercising the duties granted to that office under the Illinois Highway Code, has a duty to protect and represent the best interests of the township road district. A village trustee has a concomitant duty to protect and represent the best interests of the village. The fulfillment of these duties is subject to compromise where the same individual holds both the office of township highway commissioner and that of village trustee, because a person holding both offices could be placed in the position of favoring one governmental entity to the detriment of the other.

In this regard, one potential area of conflict relates to the use of tax moneys for road or highway purposes. As previously noted, a village may use certain road district moneys with the consent of the township highway commissioner. If the funds are not used, the moneys revert to the township road district for its use. A township highway commissioner is also authorized to transfer the proceeds from the regular road tax levy to a village for the construction of highways and streets. Clearly, a person simultaneously holding the offices of village trustee and township highway commissioner could not fairly represent the interests of each unit of government in deciding the appropriate use of tax dollars for highway purposes. *See Ill. Att'y Gen. Op. No. UP-870, issued February 28, 1963 (finding the offices of village trustee and township highway commissioner to be incompatible).*

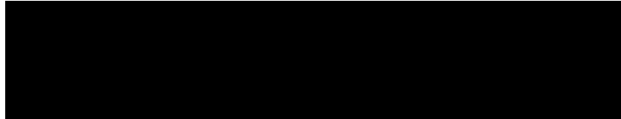
Additionally, both the township highway commissioner and the village board are expressly authorized to enter into various contractual arrangements with the other for the provision of services and materials, the lease of equipment and machinery, and the construction of road improvements. If an individual were to serve as both a village trustee and a township highway commissioner, and those units of government were to enter into a contract, he or she would be required to protect the interests of both the village and the road district. It has long been established, however, that one person cannot adequately represent the interests of two governmental units when those units contract with one another. 1991 Ill. Att'y Gen. Op. 188, 189; 1975 Ill. Att'y Gen. Op. 37, 43-47; Ill. Att'y Gen. Inf. Op. No. I-01-025, issued May 23, 2001.

Because of the potential conflicts in the duties of these offices, a person who serves simultaneously as both a village trustee and a township highway commissioner would not be able to represent the interests of both entities adequately, fully and faithfully. Therefore, the two offices are incompatible and one person cannot simultaneously hold both.

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This is not an official opinion of the Attorney General. If we may be of further assistance, please advise.

Very truly yours,



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